STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SCOTT HAYS, Charging Party, v. COAST COMMUNITY COLLEGE DISTRICT TEACHERS ASSOCIATION, Respondent.	Case No. LA-CO-1539-E PERB Decision No. 2320 July 25, 2013

Appearances: Scott Hays, on his own behalf; California Teachers Association by Michael D. Hersh, Attorney, for Coast Community College District Teachers Association.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION[1]

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Scott Hays (Hays) from the dismissal (attached) of his unfair practice charge. The charge, as amended, alleges that the Coast Community College District Teachers Association (Association)[2] violated the Educational Employment Relations

[1] PERB Regulation 32320, subdivision (d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board review of dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

[2] Hays identifies the exclusive representative, the respondent herein, as Coast Community College Association. Counsel for the respondent identifies the exclusive representative as Coast Community College Faculty Association, CTA/NEA. The Office of the General Counsel identifies the exclusive representative as Coast Community College District Teachers Association, as per the caption. The recognition clause of the collective bargaining agreement identifies the exclusive representative as Coast Community College Association – California Teachers Association/National Education Association.

Act (EERA)[3] by refusing to elevate a grievance to arbitration. The charge alleges that this conduct constitutes a breach of the duty of fair representation. The Office of the General Counsel dismissed the charge for failure to state a prima facie case. Hays timely filed an appeal and the Association timely filed an opposition.

The Board has reviewed the record in its entirety. There are no issues raised on appeal pertinent to the disposition of this unfair practice charge that were not thoroughly analyzed and disposed of by the Office of the General Counsel. We find the warning and dismissal letters of the Office of the General Counsel to be well-reasoned, adequately supported by the record[4] and in accordance with the applicable law. Accordingly, the Board hereby affirms the dismissal of the charge and adopts the warning and dismissal letters as the decision of the Board itself, as supplemented below.

DISCUSSION

Pursuant to PERB Regulation 32635(a), the appeal shall:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;

The Board takes official notice of its representation case file Case No. LA-R-794B. Coast Community College District Chapter, California Teachers Association was certified, as of May 25, 1979, as the exclusive representative of all faculty members with less than 50 percent of a full-time assignment. Hays alleges that during the time period in question he carried less than 50 percent of a full-time assignment. Therefore, the respondent in this case is as named in PERB's certification of representative. All variations therefrom are treated as referring to the exclusive representative as certified by PERB.

[3] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[4] The dismissal letter refers to the Coast Community College District (District) as Hays' "current employer." Hays correctly identifies this statement as containing a factual error. Hays is not currently employed by the District. The error is duly noted. It, however, has no bearing on the issue whether the Association breached its duty of fair representation.

(3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635, subdivision (a), the appeal must sufficiently place the Board and respondent "on notice of the issues raised on appeal." (*State Employees Trade Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trade Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381 *(Pratt)*; *Lodi Education Association (Huddock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635, subdivision (a). (*Pratt; State Employees Trade Council; Contra Costa County Health Service Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

The appeal in this case mainly restates facts alleged in the original charge that the Association failed to fairly represent Hays with respect to his grievance against the District. Other than pointing out a minor factual error in the dismissal letter (see footnote 3, *ante*) and restating quotations from PERB precedent cited in the dismissal letter, the appeal fails to reference any portion of the Board agent's determination or otherwise identify the specific issues of procedure, fact, law or rationale to which the appeal is taken. The appeal is subject to dismissal on that basis. (*City of Brea* (2009) PERB Decision No. 2083-M.)

Pursuant to PERB Regulation 32635, subdivision (b): "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (*CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The

Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

The unfair practice charge alleges that the District violated section 2 of article XV of the parties' collective bargaining agreement when it did not give Hays a class assignment for the fall 2012 semester. On appeal, Hays alleges additional contractual violations under Article X, Evaluation Procedures (sections 1-15), Article X (sections 3-6), Article X (section 9) and Article X (section 12). Hays states that "[a]ll of the above-mentioned contract violations and corresponding documentation are part of the original grievance filed with PERB." We find no support for this statement in our review of the file. The appeal provides no reason why these new charge allegations were not presented in the original or amended charge. Lacking a showing of good cause, the Board declines to consider these new allegations. Moreover, even if we were to consider these new allegations on appeal, they do not support Hays' charge any more so than his allegations concerning the District's violation of section 2 of Article XV that were included in the original charge. The issue here is whether the Association breached its duty of fair representation in refusing to elevate Hays's grievance to arbitration. As the Office of General Counsel concluded in its reasoned analysis of the charge allegations, the charge does not allege sufficient facts to demonstrate that the Association's decision not to arbitrate the grievance was without a rational basis or devoid of honest judgment. (*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332; *Rocklin Teachers Professional Association (Romero)* (1980) PERB decision No. 124.)

For these reasons, we affirm the dismissal of the unfair practice charge.

ORDER

The unfair practice charge in Case No. LA-CO-1539-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin, Winslow and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2806
Fax: (818) 551-2820

April 29, 2013

Scott Hays

Re: *Scott Hays v. Coast Community College District Teachers Association*
Unfair Practice Charge No. LA-CO-1539-E
DISMISSAL LETTER

Dear Mr. Hays:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 7, 2012 (original charge), and amended on March 18, 2013 (First Amended Charge). Scott Hays (Charging Party) alleges that the Coast Community College District Teachers Association (Association or Respondent) violated section 3544.9 of the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

Charging Party was informed in the attached Warning Letter dated February 23, 2013 (Warning Letter), that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, he should amend the charge. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before March 7, 2013, the charge would be dismissed. At Charging Party's request the deadline to file an amended charge was extended to March 18, 2013. On March 18, 2013, this office received a First Amended Charge.

Background

Charging Party does not dispute that California Teachers Association (CTA) is the affiliate of the Respondent and that the Respondent and the Coast Community College District—his current employer—are parties to a collective bargaining agreement (CBA).

The undisputed facts alleged in the original charge are as follows: A CTA representative (Robin Devitt) assisted Charging Party with filing a grievance concerning not receiving a class assignment for the Fall 2012 semester; Ms. Devitt subsequently demanded to elevate the matter to arbitration; however, the Association's President, John Dunham (President Dunham) informed Charging Party that the Association would not pursue his grievance to arbitration

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

since class assignments are not grievable under the CBA; Charging Party requested to appeal the denial of his arbitration request; CTA informed Charging Party that while it agreed with the Association's determination that the grievance could not be arbitrated, CTA would refer Charging Party to CTA Group Legal Services program for additional legal advice; and Charging Party had a telephone conversation with the CTA legal representative who advised she would make a recommendation to the Association.

Facts as Amended

The First Amended Charge includes the following relevant facts. Charging Party admits that while Ms. Devitt assisted him with his grievance, he did not receive any assistance from the Association. He asserts that President Dunham did not act with "due diligence" because he: did not review Charging Party's documents in favor of arbitration; did not have a conversation with Charging Party prior to advising that the Association would elevate the grievance to arbitration; "wasn't in a position to decide if [Charging Party's] grievance lacked 'merit'"; and failed to consider additional evidence presented to the Association after Charging Party was informed his arbitration would not be pursued. Charging Party also asserts that the CTA legal representative recommended that "CTA legal review [Charging Party's] case; which CTA refused." (emphasis in original.) In or about Spring of 2012, Charging Party organized the "Part-time Faculty Committee" and the "District-wide Part-time Faculty Committee."

Discussion

As stated in the Warning Letter, in order to state a prima facie breach of the duty of fair representation, a Charging Party must establish that the union's conduct was arbitrary, discriminatory or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) "Mere negligence" does not breach the union's duty unless "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H.) The duty of fair representation attaches to contractual matters such as grievance handling but does not attach to extra-contractual matters. (*East Side Teachers Association, CTA/NEA (Hernandez)* (1997) PERB Decision No. 1223.)

Charging Party reasserts that the Association breached its representational duty by failing to pursue his grievance to arbitration. In the Warning Letter, Charging Party was advised that refusal to pursue a grievance the union believes is unmeritorious is not a violation, as long as the refusal is not arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Thomas)* (2010) PERB Decision No. 2150; see also, *IBEW Local 1245 (Flowers)* (2009) PERB Decision No. 2079-M [a union's decision not to pursue a grievance, regardless of the merits of the grievance, is not necessarily a violation of the duty of fair representation].) In such cases, however, a union must explain why it chose not to process an employee's grievance. (*Ibid.*) Charging Party was advised by both the Association and CTA that his grievance was not arbitrable under the CBA. Specifically, Article XV, section 4 of the CBA expressly provides that "The College scheduling decisions, and the reasons therefor, shall not be subject to the grievance procedure set forth in this Agreement." Given this clear language,

the Association did not lack a rational basis for failing to consider additional evidence in support of Charging Party's grievance or further investigate the grievance.

Charging Party asserts that the CTA Group Legal Services representative recommended that CTA's legal department review his case, but CTA's legal department refused to do so. As discussed in the Warning Letter, Charging Party was referred to CTA Group Legal Services to receive advice on legal relief available outside of the CBA (i.e., "First Amendment or Whistleblower claim"). Since such claims are extra-contractual, the duty of fair representation does not attach. (*East Side Teachers Association, CTA/NEA (Hernandez)*, *supra*, PERB Decision No. 1223.) Further, there is no evidence to show that CTA's Group Legal Services advised that his grievance should be elevated to arbitration, and even if such advice was given, the charge fails to demonstrate how the Association acted arbitrarily since it previously conducted a legal review of the grievance and advised Charging Party that the matter could not be arbitrated.

To the extent Charging Party is arguing that the Association's failure to arbitrate his grievance was discriminatory, because of his organizational efforts in Spring 2012, this assertion is also without merit. Charging Party acknowledges that CTA—the California affiliate of the Association—assisted him with filing a grievance, including, but not limited to, providing him legal advice concerning the claims relating to his grievance filing. Charging Party has failed to allege facts showing that he was treated differently from other employees in a similar situation. Additionally, there are no facts to show that he suffered any adverse action given that the Association was precluded under the CBA from arbitrating Charging Party's grievance. Thus, Charging Party does not allege any facts to support this conclusory statement that the Association discriminated against him, nor does he allege the basis for any such discrimination. Factually unsupported legal conclusions in the charge need not be accepted as true. (*Charter Oak Unified School District* (1991) PERB Decision No. 873.)

Moreover, as explained in the Warning Letter, the charge does not allege a pattern of overall conduct showing that the Association breached its duty of fair representation. To the contrary, as explained above, it appears that the overall pattern of the Association's conduct in this matter was one of assistance to Charging Party. (*Service Employees International Union, Local 221 (Meredith)* (2008) PERB Decision No. 1982.) Regardless, as previously stated, nothing in the charge demonstrates how the Association's alleged conduct was arbitrary, discriminatory, or in bad faith, and thus Charging Party does not allege sufficient facts to establish a prima facie case that the Respondent breached its duty to fairly represent him or violated the EERA.

Conclusion

Accordingly, for the reasons set forth above, and those applicable in the Warning Letter, this charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for

filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Michael Hersh

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2806
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February 25, 2013

Scott Hays

Re: *Scott Hays v. Coast Community College District Teachers Association*
Unfair Practice Charge No. LA-CO-1539-E
WARNING LETTER

Dear Mr. Hays:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 7, 2012. Scott Hays (Charging Party) alleges that the Coast Community College District Teachers Association (Association or Respondent) violated section 3544.9 of the Educational Employment Relations Act (EERA or Act)[1] by breaching its duty of fair representation.

Investigation of the charge revealed the following relevant information. At all relevant times herein, Charging Party was a part-time instructor at the Coast Community College District (District). At all times relevant herein, Charging Party was represented by Respondent as the exclusive representative. California Teachers Association (CTA) is the California affiliate of Respondent. Respondent and the District are parties to a collective bargaining agreement (CBA) that expired in June 2011.

On or about the Spring of 2012, Charging Party filed a grievance against the District allegedly because the Dean of the District's Literature and Language Division violated the CBA by failing to give "first consideration of assigned for classes" to Charging Party. Charging Party asserts that the District did not assign him a class in the Fall 2012 semester because he was an active advocate of part-time faculty rights.

The charge asserts that "not one person from the [Association] has ever had a conversation with [him] about [his] grievance." However, the charge shows that Robin Devitt, a "CTA/Association Uniserv Staff" representative assisted him with the grievance process and provided "guidance," including making a demand to arbitrate the grievance.

In an August 10, 2012 e-mail message, Association President John Dunham (President Dunham) informed Charging Party, in relevant part:

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

> The Board of the [Association] recently considered your request for arbitration in the matter of you not receiving a class assignment from [the District] for the Fall 2012 semester. The Board has decided not to pursue arbitration in your case.
>
> The primary reason for the decision is that class assignments are clearly delineated in the [CBA] as not grievable. Under no circumstances is an assignment decision subject to the grievance procedure.
>
> While we are disappointed that many unit members are not receiving assignments or receiving less than desirable assignments, [it] is not feasible to arbitrate assignment decisions in all but the most rare and clearly blatant of cases.
>
> While we [do] not have a formal appeal process for decisions of this type, if you have new information that you feel the board should consider[,] we are willing to discuss the matter with you. If you wish to appeal this decision, please submit a written request to me by Friday, August 24 including any new evidence that you would like to be considered.

On August 23, 2012, Charging Party responded in an e-mail message to President Dunham and Ms. Devitt by requesting to appeal the Association's decision to deny his arbitration request. President Dunham did not respond to the appeal request, however, on August 27, 2012, Ms. Devitt informed Charging Party, in relevant part:

> The [Association] has consulted with the Legal Department of [CTA] . . . .
>
> CTA Legal agrees with the Association that the grievance you filed is not one that can be arbitrated, for the reasons that were previously explained to you. Simply put, collective bargaining laws in California limit a union's ability to negotiate limitations on how a school employer designs its academic programs, and the grievance and arbitration process are limited by law to only those specific matters that both parties have agreed to place before an arbitrator.
>
> In this case, your grievance is specifically excluded from the arbitration process. In addition, the evaluation procedures that you describe in the grievance, even if a positive evaluation could be grieved and arbitrated, would not provide the basis for an arbitrator to direct the District to reemploy you.

> Nevertheless, as Professor Dunham wrote to you, you are not without legal remedy to pursue claims on your own against the College, should you have a viable First Amendment or Whistleblower claim. Should you wish to discuss these potential claims, our chapter is willing to refer you to an attorney who is part of the CTA Group Legal Services program. Such an attorney will provide you with an initial consultation, at no cost to you, and the attorney may request additional funding from CTA if he or she believes that to be warranted. Out file on the grievance is, however, closed. . . .

The charge includes the following five e-mail excerpts from Ms. Devitt to Charging Party purportedly providing information that "mislead [him] down the wrong path. . . ."

- "I do know that the. . . contract provides certain rehire considerations, and that may be the most immediate violation to pursue, as the timeline is most likely still 'fresh' and within the contractual provisions." (Dated, April 30, 2012.)
- "Yes, I understand the nuances here. And I will spend time tomorrow and Wednesday outlining the specific contract violations." (Dated, April 30, 2012.)
- "I can't influence how the District deals with this, but I can encourage you to be armed with the power of knowing I will assist you and a proper, procedurally correct grievance will be filed." (Dated, May 3, 2012.)
- "[I have] rewritten, as to form and additional content" the grievance filed with the District. (Dated, May 30, 2012.)
- "There is a specific process and timeline and it has to be followed . . . I have and will continue to process this issue. . . ." (Dated August 4, 2012.)

On or about September 12, 2012, Charging Party "was afforded a one-hour telephone conversation with" an independent legal representative referred by CTA. Charging Party discussed with the legal representative, among other things, the grievance filed against the District. The legal representative advised that she would make a recommendation to the Association within 48 hours.

Discussion

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.]

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "to cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also *Robesky v. Quantas Empire Airways, Ltd.* (9th Cir. 1978) 573 F.2d 1082.)

As presently written, nothing in the charge demonstrates how the Association's alleged conduct was arbitrary, discriminatory, or in bad faith, and thus does not establish a prima facie violation. Indeed, the facts show that the Association's representative (Ms. Devitt) assisted Charging Party with his grievance filing, including conducting an investigation and research concerning the alleged CBA violation. Additionally, facts show that Ms. Devitt assisted him further by explaining that his claims could be pursued outside the grievance process and offered to provide him a referral to CTA's Group Legal Services program.

To the extent Charging Party alleges that the Association breached its duty of fair representation by failing to pursue his grievance to arbitration, the Board has held that a union has the discretion whether or not to pursue a grievance. (*United Teachers of Los Angeles (Thomas)* (2010) PERB Decision No. 2150.) Refusal to pursue a grievance the union believes is unmeritorious is not a violation, as long as the refusal is not arbitrary, discriminatory, or in bad faith. (*Ibid.*; see also, *IBEW Local 1245 (Flowers)* (2009) PERB Decision No. 2079-M [a

union's decision not to pursue a grievance, regardless of the merits of the grievance, is not necessarily a violation of the duty of fair representation].) In such cases, however, a union must explain why it chose not to process an employee's grievance. (*Ibid.*) Herein, Respondent reviewed Charging Party's request for arbitration and decided to deny representation. President Dunham's and Ms. Devitt's explanation that the District's assignment decision is not grievable shows a rational basis for not pursuing the matter to arbitration. Charging Party's disagreement with the Association's interpretation of the relevant CBA provision is not dispositive. (See, e.g., *SEIU Local 1000, CSEA (Burnett)* (2007) PERB Decision No. 1914-S [mere disagreement with a union's opinion about a grievance cannot form the basis of a breach of the duty of fair representation].) Simply put, there is no information presented herein that demonstrates that the Association acted arbitrarily or in bad faith. Since a union may refuse to pursue a grievance if it makes a reasonable determination that the grievance lacks merit, the charge fails to state a prima facie case.

Charging Party's assertion that Ms. Devitt "misled" him by providing improper advice concerning his grievance filing does not establish that the Association breached its representational duty. (See, e.g., *IFPTE, Local 21, AFL-CIO (Maxey)* (2009) PERB Decision No. 2077-M [ineptitude of the union does not demonstrate breach of representational duty owed to employees].) Accordingly, Charging Party's argument is without merit.

Although not clear from the charge, it appears that Charging Party is also alleging that the Association failed to respond to his request to appeal the Association's denial of Charging Party' s arbitration request. However, in President Dunham's decision, Charging Party was advised that although the Association does not have a formal appeal process, Charging Party was invited to present additional evidence which would need to be considered by the Association's board. Charging Party did not provide such information. Additionally, President Dunham's failure to respond to Charging Party's appeal request does not constitute a breach of the representational duty. (*California Faculty Association (Bacon)* (1994) PERB Decision No. 1051-H [union's lack of response to employee inquiries concerning a grievance]; *SEIU Local 1000, CSEA (Burnett)*, *supra*, PERB Decision No. 1914-S [union's failure to communicate with grievant about status of arbitration request did not violate duty of fair representation]; *Service Employees International Union, Local 250 (Hessong)* (2004) PERB Decision No. 1693-M [union did not violate duty of fair representation despite taking over two years to process a member's grievance].) Notwithstanding, even if President Dunham failed to respond to Charging Party's appeal request, CTA followed up with additional advice and offered a referral to CTA Group Legal Services program. Accordingly, the charge does not demonstrate that the Association's conduct was arbitrary, discriminatory, or in bad faith.

A prima facie case may be established based on an overall pattern of conduct even if any one of the exclusive representative's actions by itself would not breach the duty of fair representation. (*Service Employees International Union, Local 221 (Meredith)* (2008) PERB Decision No. 1982.) The charge does not allege a pattern of overall conduct showing that the Association breached its duty of fair representation. To the contrary, as explained above, it appears that the overall pattern of the Association's conduct in this matter was one of assistance to Charging Party. Regardless, as previously stated, nothing in the charge

demonstrates how the Association's alleged conduct was arbitrary, discriminatory, or in bad faith, and thus the charge does not establish a prima facie violation.[2]

For these reasons the charge, as presently written, does not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before March 7, 2013,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

YP

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[2] Additionally, PERB Regulation 32615(a)(8) requires that the charge contain "[a] statement of the remedy sought by the charging party." The original charge fails to provide a statement of the requested remedy. Charging Party should correct this deficiency should he wish to file an amended charge.

[3] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[4] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)